Supreme Court, U.S.
FILED
DEC 1 1980
MICHAEL RODAK, JR., CLERK

No. 79-1631

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

DEMOCRATIC PARTY OF THE UNITED STATES OF AMERICA and DEMOCRATIC NATIONAL COMMITTEE,
Appellants,

v.

WISCONSIN *ex rel.* BRONSON C. LA FOLLETTE and DEMOCRATIC PARTY OF WISCONSIN,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF WISCONSIN

REPLY BRIEF FOR APPELLANTS

RONALD D. EASTMAN
LYNDA S. MOUNTS
RICHARD S. SURREY

CADWALADER, WICKERSHAM & TAFT
1333 New Hampshire Avenue, N.W.
Suite 700
Washington, D.C. 20036
(202) 293-6300

Counsel for Appellants

December 1, 1980

TABLE OF CONTENTS

	Page
I. CONTRARY TO APPELLEES' ARGUMENTS, THE ISSUE BEFORE THIS COURT IS NOT WHETHER WISCONSIN HAS THE POWER TO ENACT PRESIDENTIAL PRIMARY STATUTES, BUT WHETHER THE STATE'S EXERCISE OF ITS POWER VIOLATES THE NATIONAL PARTY'S FIRST AND FOURTEENTH AMENDMENT RIGHTS.....	1
II. CONTRARY TO THE APPELLEES' ARGUMENTS, THE OPEN PRIMARY LAW AND THE WISCONSIN COURT'S ORDER IMPOSE A SUBSTANTIAL BURDEN ON THE NATIONAL PARTY'S EXERCISE OF ITS FIRST AND FOURTEENTH AMENDMENT RIGHTS.....	3
III. THE APPELLEES HAVE NOT DISTINGUISHED *COUSINS v. WIGODA*..	6

TABLE OF AUTHORITIES

	Page
CASES	
Bell v. Wolfish, 99 S.Ct. 1861 (1979)	3
Cousins v. Wigoda, 419 U.S. 477 (1975)	3,6,7
Knetsh v. U.S., 364 U.S. 361 (1960)	3
Marchetti v. U.S., 390 U.S. 39 (1968)	2
Williams v. Rhodes, 393 U.S. 23 (1968)	2
OTHER AUTHORITIES	
Democratic National Committee, Final Call for the 1980 Democratic Convention	7
S. Brams, *The Presidential Election Game* (1978)	4
R. Blank, *Political Parties, An Introduction* (1980)	4
D. Ippolito & T. Walker, *Political Parties, Interest Groups, and Public Policy: Group Influence in American Politics* (1980)	4

No. 79-1631

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

DEMOCRATIC PARTY OF THE UNITED STATES OF AMERICA and DEMOCRATIC NATIONAL COMMITTEE,
Appellants,

v.

WISCONSIN *ex rel.* BRONSON C. LA FOLLETTE and DEMOCRATIC PARTY OF WISCONSIN,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF WISCONSIN

REPLY BRIEF FOR APPELLANTS

I. CONTRARY TO APPELLEES' ARGUMENTS, THE ISSUE BEFORE THIS COURT IS NOT WHETHER WISCONSIN HAS THE POWER TO ENACT PRESIDENTIAL PRIMARY STATUTES, BUT WHETHER THE STATE'S EXERCISE OF ITS POWER VIOLATES THE NATIONAL PARTY'S FIRST AND FOURTEENTH AMENDMENT RIGHTS.

Both Appellees argue at length that the State of Wisconsin has authority to regulate presidential preference primaries. The State emphasizes Article

II, section 1 of the United States Constitution (selection of presidential electors) as a source of its authority to enact primary election statutes. *Brief for State* at 9-10. The State Party asserts generally that the National Party's selection of its presidential candidate is so "imbued" with a "public function" that Wisconsin has the power to regulate it. *Brief for State Party* at 9, 30-36.[1]

Neither of these lengthy arguments addresses the issue before this Court. The issue is not whether the State has authority to enact primary statutes. It is whether the State's exercise of its power violates the National Party's First and Fourteenth Amendment rights by forcing the Party to allow non-Democrats to influence its selection of candidates. The National Party has not challenged the State's general authority to regulate the conduct of primary elections; although, it might disagree about the source of that power as an academic matter. The National Party does contend that however a state chooses to exercise its power—whether the power is explicitly granted by the Constitution or drawn from some other source—the State must not exceed the limits imposed by the Bill of Rights and the Fourteenth Amendment to the United States Constitution. *Williams v. Rhodes*, 393 U.S. 23, 28-29 (1968); *see Marchetti v. United States*, 390 U.S. 39, 44 (1968). That should not be a controversial proposition. Resolution of the issue here requires an assess-

[1] Throughout this *Reply Brief* the National Party will refer to the briefs for the State of Wisconsin and the Democratic Party of Wisconsin as "*Brief for State*" and "*Brief for State Party*", respectively.

ment of: (a) whether the State's statute burdens the National Party's exercise of its rights; (b) if so, whether a compelling state interest justifies the burden; and, (c) if so, whether the State has chosen the least restrictive means of fostering its interest.[2]

II. CONTRARY TO THE APPELLEES' ARGUMENTS, THE OPEN PRIMARY LAW AND THE WISCONSIN COURT'S ORDER IMPOSE A SUBSTANTIAL BURDEN ON THE NATIONAL PARTY'S EXERCISE OF ITS FIRST AND FOURTEENTH AMENDMENT RIGHTS.

Aside from a brief allusion to the Wisconsin court's opinion, *Brief for State* at 25-26, neither Appellee attempts to argue (as the lower court did) that the open primary law imposes no burden on the National Party's rights because it is a "Democrats

---

[2] Similarly, the arguments of *amici curiae* James MacDonald and Elliot Maraniss that the National Party's nominee selection processes constitute state action are irrelevant in the context of this case. The question before this Court is not whether the National Party's rule constitutes state action that violates the purported rights of non-Democrats who want to influence Democratic candidate selection. The issue is whether the State may force the Party to accept the influences of non-Democrats. The question whether the National Party's rules constitute state action exercised outside the confines of the Constitution is simply not presented here, as it was not in *Cousins v. Wigoda* 419 U.S. 477, 483 n. 4 (1975); *id.* at 494 (Rehnquist, concurring).

Moreover, neither Appellee has raised here or below the question these *amici* attempt to pursue now. No record has been developed on the subject; no consideration of these issues now is appropriate. *See, e.g., Bell v. Wolfish*, 99 S.Ct. 1861, 1870 n. 13 (1979); *Knetsch v. United States*, 364 U.S. 361, 370 (1960).

only" statute. As noted in Appellants' brief, the Wisconsin open primary law permits Republicans, Independents and other nonadherents to vote in the Democratic primary. Non-Democrats have for years crossed over and affected the apportionment among candidates of delegates to the Democratic National Convention. And Wisconsin's attorney general had conceded the intent and operation of the statute from the beginning of the case. See *Brief for Appellants* at 27-29.[3]

There should be no doubt that the statute forces the Party to permit non-Democrats to influence its candidate selection. As noted in Appellants' *Brief Opposing Motion to Dismiss or Affirm*, no one familiar with elections would seriously contend that an open primary limits voting to party adherents. The essence of the Wisconsin statute and open primary laws generally is that any voter may vote in a party's primary regardless of party affiliation.[4]

---

[3] The Attorney General apparently has returned to the view of the statute he advanced before the lower court. The brief for the State pointedly criticizes the National Party's rule for excluding "honest Republicans," Independents and minor party adherents from influencing the choice of the Democratic Party's nominee. *Brief for State* at 17.

[4] "The major characteristic of open primaries is that any registered voter can vote in the primary of either party." R. Blank, *Political Parties, An Introduction* 315 (1980). "The states with open primaries [including Wisconsin] allow any qualified voter to participate in a party primary without designating party affiliation or preference." D. Ippolito & T. Walker, *Political Parties, Interest Groups, and Public Policy: Group Influence in American Politics* 175 (1980). "[P]rimaries may be open or closed depending on whether voters can 'cross over' and vote the other party contest (open) or must stick to their own party contest (closed). " S. Brams, *The Presidential Election Game* 2 (1978).

The Appellees contend instead that the statute's abrogation of Rule 2A imposes no significant interference with the National Party's exercise of its rights because the Party's rule does not foster a legitimate purpose. For example, the State argues that the Party has not justified preventing "principled crossovers" from influencing the selection of its candidate. It also argues that the Party has not profferred any evidence that "raiding" has been a problem. *Brief for State* at 26-32.

The purported distinction between "principled crossovers" and "raiders" is irrelevant. The statute substitutes totally the State's judgment for the Party's as to the appropriate standard for participation in the Party's candidate selection processes and the qualification of delegates. Rule 2A has established a standard for participation in the Party's nominee selection processes. The Rule is designed to minimize the dilution of the votes of Party adherents, to limit participation in the candidate selection processes to those who share the Party's values and hopes for electoral success. The statute and the Wisconsin court's order interfere substantially with the Party's exercise of its rights. *Brief for Appellants* at 23-26.[5]

[5] The State Party argues at length that empirical data do not support the Party's perception of the need for Rule 2A. While the National Party believes that neither a state legislature nor a state court may substitute its own judgment for the Party's, the National Party in fact had a solid basis for its concern. As shown in Appellants' brief, more than twelve years of experience and specific data demonstrating the distortion caused by crossovers in Wisconsin offered ample basis for adopting Rule 2A in its present form. *Brief for Appellants* at 4-9, 26-28.

III. THE APPELLEES HAVE NOT DISTINGUISHED *COUSINS v. WIGODA*

The Appellees have not distinguished the instant case from *Cousins v. Wigoda*, 419 U.S. 477, as they cannot. The State reiterates the erroneous assertion that *Cousins*, but not this case, involved selection of individual delegates to the Convention. *Brief for State* at 11-12. See *Brief for State Party* at 18-19. That contention misreads *Cousins* and ignores the facts of this case. The crucial matters at issue in *Cousins* were the same as they are here: the Party's ability to fashion its own candidate selection process and its own qualifications for delegates.[6] *Brief for Appellants* at 22.

Candidate selection was at the heart of *Cousins v. Wigoda*. In *Cousins*, this Court held that Illinois' interests were not compelling because of the "special function" of the delegates to the Convention. That "special function" was and is "the nomination of the party's candidates for the office of President and Vice President of the United States." *Cousins v. Wigoda*, 419 U.S. at 489.

The State also errs in asserting that this case does not involve the functions of writing the platform and voting on party structure and procedures—as as it says *Cousins* did. *Brief for State* at 11. The Party's rules explicitly link apportionment of the delegates among the candidates to the Convention's

---

[6] For an extensive summary of the history of national party conventions operating with independence from state laws, see, *Brief for Petitioners* at 48-67, *Cousins v. Wigoda*, 419 U.S. 477 (1975).

other important functions. The Party allocates seats on the Platform, Credentials and Rules Committees on the basis of the candidates' relative delegate strength. Final Call for the 1980 Democratic Convention (Record at 205) at 9. Distortions in the reflection of Democrats' relative candidate preferences thus would seriously affect platform, credentials and rules issues.

Finally, the State Party argues that the Wisconsin court's order here is narrowly drawn and less intrusive than the Illinois court order issued in *Cousins*. *Brief for State Party* at 40. As shown in Appellants' brief, the Wisconsin order intrudes far more severely into the Convention's most important function. Although the Wisconsin court formulated what facially is a negative order,[7] the effect of it is to require the Convention to seat the Wisconsin Party's delegates so long as they comply with all rules other than Rule 2A. As a result, the Wisconsin court's order would force the Convention to seat the delegates from Wisconsin, something the full court in *Cousins* agreed no state could do. 419 U.S. 488; *id.* at 492 (Rehnquist, J., concurring); *id.* at 496 (Powell, J., concurring in part and dissenting in part).

---

[7] The Wisconsin court ordered that ". . . Wisconsin delegates to the Democratic Party national convention . . . are not disqualified as delegates solely by reason of the apportionment being determined as required by the Wisconsin statutes." Appendix A to *Jurisdictional Statement* at 42a.

CONCLUSION

WHEREFORE, the National Democratic Party respectfully requests this Court to reverse the order of the Wisconsin Supreme Court on appeal.

Respectfully submitted,

RONALD D. EASTMAN
LYNDA A. MOUNTS
RICHARD S. SURREY

CADWALADER, WICKERSHAM & TAFT
1333 New Hampshire Avenue, N.W.
Suite 700
Washington, D.C. 20036
(202) 293-6300

Counsel for Appellants

December 1, 1980